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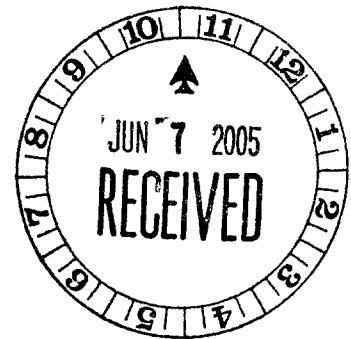
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BALTIMORE, MD
NEW YORK, NY
SAN FRANCISCO, CA
WASHINGTON, D.C.
WELLESLEY, MA

June 6, 2005

VIA FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW - Room 700
Washington, DC 20423-0001




Re: Finance Docket No. 34391
New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway-
Petition for Reconsideration

Dear Secretary Williams:

In connection with the above-referenced matter, we have enclosed for filing an original and 10 copies of the National Solid Wastes Management Association, et al's Reply to Petition for Reconsideration of New England Transrail, LLC, as well as a 3.5" disk containing the Reply. We have also enclosed a copy of the Reply for date stamping and return to us via the enclosed self-addressed stamped envelope.

Thank you for your assistance with this filing. Should you have any questions, please do not hesitate to contact me at the direct dial number noted above.

Very truly yours,


Stephen M. Richmond

SMR/maf
Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34391

NEW ENGLAND TRANSRAIL, LLC, D/B/A/
WILMINGTON AND WOBURN TERMINAL RAILROAD CO.
-CONSTRUCTION, ACQUISITION, AND OPERATION EXEMPTION-
IN WILMINGTON AND WOBURN, MA

**REPLY OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
TO NEW ENGLAND TRANSRAIL, LLC'S
PETITION FOR RECONSIDERATION**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**REPLY OF
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TO NEW ENGLAND TRANSRAIL, LLC'S
PETITION FOR RECONSIDERATION**

The National Solid Wastes Management Association, the Solid Waste Association of North America - Massachusetts Chapter, the Massachusetts Municipal Association, the Construction Materials Recycling Association, the Integrated Waste Services Association, American Ref-Fuel Company LLC, and New Bedford Waste Services ("Respondents") oppose New England Transrail, LLC's ("NET's") petition for reconsideration and in the alternative for remand to the Section of Environmental Analysis ("SEA"), and respectfully support the decision of the Surface Transportation Board ("Board") to dismiss NET's petition for exemption under 49 U.S.C. 10502.

BACKGROUND

NET previously filed a petition for exemption to construct rail line, acquire track and provide common carrier rail service. The procedural history of this case is well described in the Board's decision to dismiss NET's petition, dated May 3, 2005. *New England Transrail -*

Construction, Acquisition and Operation Exemption, STB Finance Docket No. 34391 (STB served May 3, 2005) (the "Board's Decision"). NET filed a petition for reconsideration (the "Petition") that is currently pending before the Board.

The Petition, supplemented by large exhibits and two new certifications, claims that (i) the Board's Decision should be reconsidered because the Board's decision was based on material errors of fact, and (ii) the Board should consider additional new information as to NET's proposed solid waste processing activities. See Petition at 4-5 and 27.

REPLY

The Petition fails to meet the procedural prerequisites for reconsideration as established by the Board's regulations and must be dismissed. Even if the Petition is not dismissed on procedural grounds, the Board's Decision was clearly correct and was not based on material errors of fact.

I. The Petition for Reconsideration Violates the Board's Procedural Requirements and Must be Dismissed.

A. The Petition substantially exceeds the maximum length allowed for a petition for reconsideration and must be rejected. The Board's rules governing the filing of petitions for reconsideration state:

The petition and any reply **must not exceed 20 pages in length**. A separate preface and summary of argument, not exceeding 3 pages, may accompany petitions and replies and must accompany those that exceed 10 pages in length. (Emphasis supplied). 49 CFR 1115.3(d).

The requirement that the petition for reconsideration must not exceed 20 pages in length is mandatory, and where the Board's regulations contain mandatory procedural requirements, the Board must adhere to those requirements.

NET's Petition is 33 pages long, supplemented by six pages of new certifications and several lengthy exhibits. With this filing, NET seeks to impermissibly add additional information to the formal record in this proceeding, an issue which is addressed below. However, as a procedural matter, the Petition clearly exceeds the 20 page maximum established in the Board's regulations for a petition for reconsideration and must therefore be dismissed in its entirety.

B. NET is impermissibly attempting to supplement the record with factual information previously available to NET and this information must not be allowed. The Board's rules governing the filing of petitions for reconsideration state :

When, in a petition filed under this section, a party seeks an opportunity to introduce evidence, the evidence must be stated briefly and **must not appear to be cumulative, and an explanation must be given why it was not previously adduced.** (Emphasis supplied). 49 CFR 1115.3(c).

The Board has applied this limitation very strictly in past cases, refusing to allow new evidence in a petition for reconsideration if the information could have been submitted by the date of the closing of the record in the proceeding. "The Board would not ordinarily accept evidence or argument offered in connection with a petition for reconsideration unless the material in question is truly new (as opposed to newly offered) evidence." *Pejepscot Industrial Park, Inc. - Petition for Declaratory Order*, STB Finance Docket No. 33989 (STB served February 2, 2004); see also *Bulkmatic Railroad Corporation - Acquisition and Operation Exemption*, STB Finance Docket No. 34145 (STB served May 15, 2003).

The Board has further cautioned petitioners that:

"Nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. ... And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to 'behave like Penelope, unraveling each day's work to start the web again the next day.'" (Citations omitted).

Texas Municipal Power Agency, STB Finance Docket No. 42056 (STB served Sept. 27, 2004).

The Petition is heavily weighted with information and arguments that were readily available to NET before the record was closed, but which NET voluntarily chose not to submit or use. The Petition includes the following:

- Exhibit A - NET's Construction Related Release Abatement Measure ("CRAM") Plan, dated November 18, 2004;
- Exhibit B - Exhibit B - NET's Response to Town of Wilmington Comments on CRAM Plan, dated February, 2005;
- Argument related to solid waste handling in Petition, pages 27-31;
- Certification of Thomas J. Egan related to solid waste handling, dated May 14, 2005; and
- Certification of John C. Ryan related to solid waste handling, dated May 16, 2005.

In what can only be viewed as an extraordinary juxtaposition, NET recently asserted to the Board that the CRAM Plan was not a necessary component of the record in this proceeding. *See* NET Reply to Petition of Town of Wilmington, dated February 4, 2005 ("NET Reply"), at 10-16. This assertion was incorporated into the Board's Decision.¹ However, in its current Petition, NET now seeks to offer the entire CRAM Plan (which is approximately two inches thick) into evidence after the record has been closed to establish facts it previously deemed unnecessary.

Similarly, NET previously chose not to submit its February 2005 response to comments from the Town of Wilmington on the CRAM Plan to the SEA while at the same time arguing that it was unnecessary to this proceeding. Now NET seeks to introduce the entire response (this document is approximately one inch thick) in support of its Petition.

The Petition presents detailed information on contemplated solid waste handling and processing activities, information which NET previously neglected to provide to the Board while the record remained open. This is little more than an attempt to circumvent the Board's admonition that NET should include such information in a new petition for exemption if NET wishes to reapply. Board's Decision at 5.

The CRAM Plan and the NET response to comments, as well as the additional details on contemplated solid waste activities, were all available in their entirety and known to NET at the time the record in this proceeding was open for submittal of evidence. NET made an informed and strategic decision not to submit this information into the record. Regardless of the reason NET withheld this information previously, NET's failure to submit the information kept the Board from understanding the extent of the changes that were occurring to the proposed project. NET cannot now reshape its argument to include these materials. As the Board cautioned in *Texas Municipal Power*, NET may not reverse this deliberate decision, change its argument, and supplement the record at this late date.

NET is similarly prohibited from introducing into the record the two certifications attached to the Petition. These certifications merely contain statements that NET believes will support its new arguments, but none of the information stated in those certifications could be construed as unavailable to NET previously. In essence, NET is seeking to use the Petition as the vehicle to overcome the defects that caused the Board to dismiss the original petition for exemption in the first instance. NET is simply prohibited from attempting to insert this information into the record after the record has closed.

¹The Board stated: "NET filed timely responses to each of these petitions, arguing among other things, that the additional design details in its Construction RAM did not need to be submitted to SEA because the information it had earlier supplied to SEA was sufficient." *New England Transrail* (Footnotes omitted).

II. The Board's Decision Does Not Involve Material Error and the Petition Should Therefore Be Dismissed.

Pursuant to 49 U.S.C. 722(c) and 49 CFR 1115.3, a petition for reconsideration will be granted only if the petitioner shows that: (1) the prior action will be affected materially because of new evidence or changed circumstances; or (2) the prior action involves material error. As discussed above, the only new information that NET has provided is information that was previously available to NET and the Board should not consider such information at this late date or allow the information to be entered into evidence.

NET's claim that the Board committed material error is not supported by the record. There is no question that either the project proposed by NET, or the information supplied by NET about the project, changed substantively during the Board's proceeding.

The original project proposed by NET, and the potential environmental impacts of that project, are substantially and fundamentally different from the project that NET now admits to proposing. The project's evolution is well described in the Board's Decision, and in the reply to the Petition by the Massachusetts Department of Environmental Protection, and therefore that evolution is not repeated here.

It is important to highlight that NET's reluctant approach to providing full information about the project over time has already caused the SEA to conduct two evaluations of the project's environmental impacts, the first dated August 4, 2004, and the second dated December 22, 2004. The substance of NET's argument appears to be that since some pieces of information about its true plans were available to the Board in different federal, state or local forums, the Board has made a material error in dismissal because there was sufficient information available to the public for the Board to render a positive decision on its petition for exemption. In the

alternative, NET argues that even if there was insufficient information available to the Board, the Board is required to continually return to the SEA for additional evaluation as more information about the project has been made known by the applicant.

There is nothing in the applicable statutes, regulations or case law that would require the Board to reward NET for its limited disclosure of information or its evolving description of projected operations. No applicant is entitled to withhold information from the Board and then claim that it should not be prejudiced when the information is forced to be revealed by third parties.² Where NET has failed to comply with its responsibilities to keep the Board informed of the true nature of the project, the Board is certainly not required to ignore that failure. Neither is any applicant entitled to claim, as does NET, a right to repeatedly return to the SEA for additional project evaluation when the applicant reluctantly reveals new details about critical project components.

CONCLUSION

Respondents respectfully request that the Board uphold its decision by dismissing NET's Petition for Reconsideration.

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION
and
SOLID WASTE ASSOCIATION OF NORTH
AMERICA - MASSACHUSETTS CHAPTER
and
MASSACHUSETTS MUNICIPAL
ASSOCIATION
and

² The Board's Decision accurately states: "In short, in its petition and the supplemental information provided to SEA during the course of the environmental review, NET presented a version of the project that is fundamentally different from the modifications that it submitted to MADEP as part of the construction RAM."

CONSTRUCTION MATERIALS RECYCLING
ASSOCIATION
and
NEW BEDFORD WASTE SERVICES, LLC

By their attorneys,

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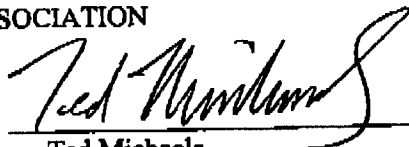
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Vice President, General Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply of the National Solid Wastes Management Association, et al, was served this day via first class mail upon the following:

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Stephen M. Richmond

Dated: June 6, 2005